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Via Electronic Filing

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth St., S.W.
Washington, DC 20554

Re: **WT Docket No. 02-55**

Dear Ms. Dortch:

As Verizon Wireless (“Verizon”) explained in its April 1, 2004 filing entitled “The Federal Communications Commission Has No Authority To Award Spectrum To Nextel Through A Private Sale,” Section 309(j) of the Communications Act requires the Commission to award any spectrum in the 1.9 GHz band by holding an auction. In addition to offending Section 309(j)’s competitive-bidding requirement, a private sale of 1.9 GHz spectrum to Nextel Communications (“Nextel”) also would violate the Anti-Deficiency Act and the Miscellaneous Receipts Act.

The Anti-Deficiency Act prohibits any “officer or employee of the United States Government or of the District of Columbia government” from “involv[ing] either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.” 31 U.S.C. § 1341(a)(1)(B). A private sale at a below-market price, or at a price that is discounted to compensate Nextel for payments to third parties, is the functional equivalent of an outright “payment of money” to Nextel or any third party beneficiaries, and thus would contravene the Anti-Deficiency Act.

Any private transaction to which Nextel would agree necessarily would involve a lower price than the one Nextel anticipates would prevail at auction. As a profit-maximizing rational actor, Nextel would never agree to pay more in a private sale than it calculates it would have to pay in an auction. Independent industry analysts confirm that a private sale of 1.9 GHz spectrum would confer a windfall on Nextel. *See* Legg Mason, *Logjam Breaks on FCC Consideration of Nextel Spectrum Swap*, Mar. 10, 2004, at 2 (stating that Nextel stands to receive a “\$1.5 billion to \$3.2 billion net gain”); *see also* Moody’s Investor Servs., *Moody’s Assigns B2 Rating to Nextel Communications \$500 Million 5.95% Senior Notes Due 2014*, Mar. 24, 2004 (stressing that the award of 1.9 GHz spectrum to Nextel “would bring tremendous long term benefits to the company” by allowing it “to more efficiently utilize its

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spectrum and also to invest in next generation technologies”); Bear Stearns, *Spectrum Swap Reported in Nextel’s Favor*, Mar. 9, 2004, at exhibit 3 (describing the award of 1.9 GHz spectrum as “a transforming event for Nextel”); *Morningstar Analyst Report*, Feb. 25, 2004, at 2 (predicting that by “gain[ing] a chunk of valuable spectrum in the 1.9-GHz band,” Nextel would “lower its capital spending, reduce caller interference, and [become] a more attractive acquisition target”). Furthermore, we understand from public reports that the Commission is considering compensating Nextel for the payment of costs to public safety entities by *subtracting* that amount from Nextel’s tab for the spectrum. *See FCC Eyes Draft Giving Nextel 1.9 GHz, but at Higher Pricetag*, COMMUNICATIONS DAILY, Mar. 11, 2004.

A private spectrum sale, especially one in which Nextel is expressly compensated for funds that it lays out to public safety entities, would deprive the federal Treasury of a portion of the proceeds that it would otherwise receive and thus would be the functional equivalent of a “contract or obligation” to pay a sum equal to the difference in value. From the standpoint of the Treasury, such a private sale (which necessarily reduces the Treasury’s take) would have the same economic effect as a direct cash outlay (which draws on funds in the Treasury). In other words, the private sale contemplated here is an in-kind “payment of money” to Nextel in violation of the Anti-Deficiency Act. The Commission cannot evade the Act’s demands by seeking to accomplish indirectly what it cannot achieve directly. *See, e.g., Sunray Mid-Continent Oil Co. v. FPC*, 364 U.S. 137, 152 (1960) (“[O]nce want of power to do this directly were established, the existence of power to achieve the same end indirectly through the conditioning power might well be doubted”); *Time Warner Entm’t Corp., L.P. v. FCC*, 56 F.3d 151, 201 (D.C. Cir. 1995) (emphasizing that the FCC could not “accomplish indirectly what [federal law] directly proscribes”), *cert. denied*, 516 U.S. 1112 (1996); *Richmond Power & Light v. FERC*, 574 F.2d 610, 620 (D.C. Cir. 1978) (holding that the agency could not achieve indirectly through conditioning power of Federal Power Act what it is otherwise prohibited from achieving directly); *cf. Sutton v. United States*, 256 U.S. 575, 580 (1921) (recognizing that, absent an appropriation, the Anti-Deficiency Act prohibits both *implied* contracts and *express* ones).

For similar reasons, a private sale of 1.9 GHz spectrum to Nextel would offend the Miscellaneous Receipts Act as well. 31 U.S.C. § 3302(b) provides that “an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for

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any charge or claim.” The private sale at issue would be the functional equivalent of a “deduction” equal in value to the spectrum’s fair market price (as determined through a competitive auction) and the necessarily lower rate at which Nextel obtains that spectrum. It is also an *express* “credit” for the funds paid by Nextel to third parties. Given these facts, the Commission would not be depositing in the federal Treasury a sum equal to the spectrum’s true value, or even its own assessed value of the spectrum; rather, only a portion of the spectrum’s value would be deposited, with the remainder going to Nextel as a deduction. The Miscellaneous Receipts Act therefore mandates that the Commission award 1.9 GHz spectrum through an auction, thereby ensuring that the full measure of the spectrum’s value is deposited in the federal Treasury.

In conclusion, all parties in this proceeding agree on the singular importance of protecting critical public-safety communications in the 800 MHz band from the harmful interference caused by Nextel’s operations in adjacent blocks of spectrum. The only dispute is how best to do so. The proposal endorsed by Verizon and countless others – in-band realignment at 800 MHz – would accomplish the same result as Nextel’s preferred solution. But it would do so through a legally sustainable funding mechanism.

Sincerely,

/s/

Helgi C. Walker